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No. 97 ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

YANKEE ATOMIC ELECTRIC COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal government, having entered into fixed-price contracts to sell certain services, may subsequently enact legislation that imposes additional costs—incurred by the government in providing those services—predominantly on the purchasers under the previous fixed-price contracts?

2. May Congress impose retroactive financial liability on companies based solely on the fact that they purchased government services as much as thirty years ago?

RULE 29.6 STATEMENT

The parent companies of Petitioner Yankee Atomic Electric Company are:

New England Power Company
The Connecticut Light and Power Company
Boston Edison Company
Central Maine Power Company
Public Service Company of New Hampshire
Western Massachusetts Electric Company
Montaup Electric Company
Central Vermont Public Service Corporation
Commonwealth Electric Company
Cambridge Electric Light Company

Petitioner has no subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Yankee Atomic Electric Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-31a) is reported at 112 F.3d 1569. The opinion of the Court of Federal Claims (App. 33a-43a) is reported at 33 Fed. Cl. 580.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. The court of appeals denied a timely petition for rehearing and suggestion for rehearing *en banc* on August 15, 1997. (App. 44a-45a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The relevant provisions of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, are set forth in the Appendix to this petition. App. 46a-48a.

STATEMENT

In enacting the Energy Policy Act of 1992 ("EPACT"), Congress imposed a monetary assessment falling primarily upon nuclear utility companies that previously had contracted with the government to purchase uranium enrichment services. The assessment is earmarked to pay costs the government incurred in performing those enrichment services contracts.

As a result, Petitioner Yankee Atomic Electric Company ("Yankee") is now required to pay the government $15 million *more* than it previously paid under fixed-price contracts for the same government enrichment services. In the aggregate, over a fifteen-year period, EPACT requires Yankee and other nuclear utilities to make "special assessment" payments of more than $2 billion.

This case involves a challenge to EPACT's special assessment as a violation of Yankee's fixed-price contract rights and of Fifth Amendment due process principles. The Court of Federal Claims held that the Act was "an impermissible exercise of sovereign power." App. 41a. A divided Federal Circuit—finding that the imposition of additional costs on the government's prior fixed-price

contractors was protected by the "sovereign acts" doctrine—reversed.

A. Background

1. Beginning in the late 1950s, the government sold uranium enrichment services to utility companies that operated nuclear power plants.[1] The government operated its uranium enrichment enterprise as a commercial business and provided enrichment to its customers pursuant to contracts. *See* 42 U.S.C. § 2201(t) (authorizing such contracts).

Between 1959 and 1985, Yankee purchased uranium enrichment from the government under a series of fixed-price contracts. Both parties agree that Yankee paid the specified prices for all units of enrichment it purchased, and that the contracts precluded the government from increasing the per-unit enrichment prices. *See* App. 2a.

Yankee permanently shut down its only nuclear plant in 1992. It therefore no longer purchases enrichment services from any source.

2. By the 1980s, Congress recognized that the government's uranium enrichment business faced "rising competition from other countries" and a "declining global market share." H.R. Rep. No. 102-474(I), at 142 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1954, 1965. Congress addressed this problem by comprehensively restructuring, and planning to privatize, the government's enrichment business. *See* H.R. Rep. No. 102-474(II), at 75 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2064, 2082.

One of the issues Congress faced in restructuring the government's uranium enrichment business was how to address the costs of decontaminating and decommission-

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[1] Those services were provided by a succession of federal entities, including the Atomic Energy Commission and the Department of Energy ("DOE").

ing ("D&D") the government's uranium enrichment plants. Congress concluded that a restructured uranium enrichment business could not operate profitably or maximize its long-term value if it remained responsible for the outstanding D&D costs. *See* H.R. Rep. No. 102-474(I), at 142-145, *reprinted in* 1992 U.S.C.C.A.N. at 1965-1968. Ultimately, Congress (1) created the United States Enrichment Corporation ("USEC") to take over and eventually privatize the government's uranium enrichment business, *see* 42 U.S.C. §§ 2297a, App. 48a, 2297d; and (2) established a separate Uranium Enrichment Decontamination and Decommissioning Fund ("D&D Fund") to pay the D&D costs. 42 U.S.C. § 2297g(a), App. 46a. To finance the D&D Fund, Congress provided for annual deposits of $480 million (adjusted for inflation). *Id.* § 2297g-1(a), App. 46a.

Up to $150 million annually is to be collected from "domestic utilities" over a fifteen-year period, for a total of approximately $2.25 billion. *Id.* § 2297g-1(c), (e), App. 47a-48a.[2] To obtain the $150 million per year, Congress imposed a "special assessment" based on "the total amount of separative work units ["SWUs"][3] [ea]ch utility has *purchased* from the [government] . . . before October 24, 1992." *Id.* § 2297g-1(c), App. 47a (emphasis added). However, in apparent recognition of the small "secondary market" in which purchasing utilities occasionally had sold government-produced SWUs to others, Congress eventually added a definition of the statutory term "purchase," which provides that (1) a utility is considered to have

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[2] Congress authorized appropriations for the remainder. *See* 42 U.S.C. § 2297g-1(d), App. 47a. Between 1993 and 1995, Congress actually appropriated only $331 million to the D&D Fund, $692 million less than authorized by the EPACT. Office of Envtl. Mgmt., U.S. Dep't of Energy, Uranium Enrichment Decontamination & Decommissioning Fund Triennial Report 14 (May 3, 1996).

[3] The "separative work unit," or "SWU," is "the common measure by which uranium enrichment services are sold." 10 C.F.R. § 766.3.

purchased a separative work unit if it was produced by the government but purchased by the utility from another entity, and (2) a utility is not considered to have purchased a government-produced separative work unit if it was initially purchased by that utility but subsequently resold. *Id.* § 2297g-1(c)(1) & (2), App. 47a.

All secondary market SWUs subject to the EPACT assessment originally were purchased under a contract with the government. The government concedes that at most only 15% of the special assessment amounts relate to secondary market SWUs. *See* App. 28a. Therefore, at least 85% of the special assessment falls on enrichment units purchased directly under government contracts.[4]

3. From 1959 to 1985 Yankee purchased a total of 881,860.96 units of uranium enrichment under its contracts with the government and paid prices ranging from $26.00 to $153.00 per SWU. *See* J.A. 555.[5] As a result of the special assessment, Yankee now must pay the government approximately $1 million more each year for fifteen years. Over the fifteen-year period, Yankee will pay approximately $17.00 more for each SWU that it purchased and paid for long ago.[6]

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[4] Yankee believes that all secondary market purchasers subject to the EPACT assessment are utility companies that also had *direct* purchase contracts with the government. The EPACT assessment thus falls solely on this discrete group of contracting utilities.

[5] "J.A." refers to the joint record appendix from the United States Court of Appeals for the Federal Circuit.

[6] Other domestic utilities that purchased enrichment services from the government also have been assessed substantial additional sums. Approximately 30 related cases, each involving claims similar to Yankee's, are currently stayed in the United States Court of Federal Claims pending the outcome in this case.

B. Proceedings Below

4. In 1994 Yankee filed suit in the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491(a)(1). Yankee asserted that the special assessment is a retroactive price increase that violates Yankee's fixed-price contract rights. The trial court agreed and granted summary judgment to Yankee. App. 33a. It held that by imposing the per-unit special assessment, "the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power." *Id.* at 41a.

5. A split panel of the Federal Circuit reversed. *Id.* at 1a. The panel majority held that, under the "sovereign acts" doctrine, the EPACT special assessment "constitutes a general exercise of Congress's taxing power . . . rather than an act that retroactively increases the price charged to contracting parties." *Id.* at 14a. It based this conclusion largely on the fact that, in view of the secondary market purchases, "the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services." *Id.* at 10a.[7] Following the same logic with respect to the "unmistakability doctrine," the panel majority found that the fixed-price contract terms "[a]t most" gave Yankee "a vested right to be immune from later attempts to retroactively increase the prices charged." It concluded that "[t]his right has not been taken because . . . the

[7] The Court found that, because the EPACT assessment did not fall *exclusively* on the government's contract partners, (1) Congress' "main purpose" was to "spread the costs" of decontaminating and decommissioning the government's enrichment plants among "the ultimate beneficiar[ies] of the DOE's services," and (2) Congress was not "acting for the purpose of retroactively increasing the price of its earlier contracts." *Id.* at 9a, 10a.

assessment is a general, sovereign act rather than a retroactive price increase." *Id.* at 21a n.8.

In dissent, Judge Mayer found that "the government retroactively abrogated the essence of the contracts at issue." *Id.* at 27a. Given the government's acknowledgment that at least 85% of the special assessment falls on SWUs purchased directly under government contracts, the dissent concluded that the "sovereign acts" doctrine did "not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors." *Id.* at 29a.[8] Therefore, "Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike." *Id.* at 30a.

REASONS FOR GRANTING THE PETITION

This case presents an important question regarding the government's power to retroactively impose additional costs on its contracting partners. A divided panel of the Federal Circuit upheld the retroactive cost-shifting effected by the EPACT assessment, finding it persuasive that "the special assessment does not reach *only* those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had no contracts with the Government." App. 12a (emphasis added and omitted). Thus, despite the fact that the assessment falls *predominantly* on the government's contracting partners, the majority below concluded that it was a "general tax."

This striking holding merits review for several reasons. First, by allowing the government to single out its contracting partners for particular added burdens, the court

[8] *See also id.* at App. 29a (dissent) ("That a small fraction of others who indirectly purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.").

of appeals has seriously altered the proper balance between the obligation of the federal government to respect the terms of its own contracts and the power of the federal government as sovereign to legislate for the public good. *See United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996). Although the fixed-price terms of a contract to purchase goods or services from the government would not typically shield purchasers from exactions imposed by general laws, such contract terms should provide a barrier to *targeted* legislation, like that involved here, which has the substantial effect of shifting the government's performance costs as seller onto the purchaser. That principle not only sets reasonable boundaries for the "sovereign acts" defense, it also accords most naturally with the common-sense expectations of those contracting with the government: namely, that the government, although not contracting away its sovereign powers, is nevertheless bound not to legislate to shift the very risks it assumed in the contract back onto the other party. By treating the legislation here as a "general tax"—on the ground that its impact was not *exclusively* on the government's contracting partners—the Federal Circuit has given far too much leeway to the government to evade its own contractual responsibilities. *See* pp. 9-16, *infra*.

The decision below suffers from a second flaw as well: it forces petitioner (and other utility companies) to retroactively shoulder costs of resolving a problem for which they bear no responsibility. Although this Court has upheld a number of retroactive laws against challenges under the Due Process and Taking Clauses, *see e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602 (1993), it never has allowed retroactive assessment of costs "that [are] due to causes other than the . . . conduct" of those being assessed. *Turner Elkhorn*, 428 U.S. at 25.[9]

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[9] *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66

Here, the government is seeking to require retroactive payment for the cleanup of its enrichment plants based solely on the utilities' purchase of uranium enrichment services performed at those plants. If that conduct is deemed sufficient to support the imposition of retroactive liability, then the power of the government to reorder past events would be virtually limitless. Moreover, the thirty-year retroactive application of the EPACT assessment is particularly egregious and well beyond periods involved in this Court's previous cases. *See* pp. 16-19, *infra*.

These issues are of both particular and general importance. Most directly, the law at issue here requires petitioner and other utilities to pay up to $150 million annually for a fifteen-year period, a total in excess of $2 billion. More generally, the decision below has a potential effect on any government contractor where the government subsequently decides that it has paid too much or charged too little. According to the court of appeals, the government is then free to increase the obligations of its contracting partners, or presumably to reduce its own obligations, as long as it structures its later actions so that they do not fall *exclusively* on those contracting partners. That holding marks a significant step backward from principles recently reaffirmed by the Court in *Winstar*. Further review therefore is warranted.

I. THE FEDERAL CIRCUIT IMPROPERLY DETERMINED THAT A FEDERAL STATUTORY PROVISION THAT PREDOMINANTLY IMPACTS THE GOVERNMENT'S CONTRACTING PARTNERS IS A "PUBLIC AND GENERAL" SOVEREIGN ACT FOR WHICH THE GOVERNMENT IS IMMUNE FROM CONTRACTUAL LIABILITY.

In upholding the EPACT assessment, the Federal Circuit did not dispute that purchasers like Yankee had paid the full contract prices for the enrichment services. App.

U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42) (challenging basis for imposing retroactive assessments); *see also* pp. 17-18, *infra* (discussing *Eastern Enterprises*).

2a. Nor did the court question that the government would be barred by traditional principles of contract law from simply demanding that its contracting partners pay more for the previously-sold services. *Id.* at 18a. Rather, the court below held that the government was entitled to compel additional payments from its contracting partners to clean up its own enrichment plants because its action was protected by the "sovereign acts" doctrine.

Applying a "purpose"-based test—to "determine whether the Act is designed for the purpose of affecting or altering the Government's prior contracts"—the court found it "[i]mportant[]" that the EPACT assessment, while falling *predominantly* on the government's contracting partners, did not fall *exclusively* on them. *Id.* at 9a-10a. The court thus concluded that the law was not a violation of any contract rights, but merely a "general tax." *Id.* at 12a.

1. The Federal Circuit's analysis has several serious flaws. Initially, it wrongly transforms the sovereign acts defense into a purpose-based inquiry. Nothing in this Court's prior cases declares that inquiry into legislative *purpose* is determinative of whether the government has breached its prior contracts. Rather, the decisions look to the *effects* on the government's contract obligations of its later actions.[10] *See* pp. 11-14, *infra.* Moreover, as the Court has frequently recognized, inquiry into legislative purpose often is unreliable. Indeed, in this very case the Federal Circuit's focus on legislative "purpose" led it to attribute dispositive importance to a provision added simply to accommodate the small secondary market for SWUs "purchased from" the government under contracts.

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[10] *See Winstar*, 116 S.Ct. at 2468 (plurality opinion) ("Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners.").

2. The court of appeals then compounded its error by wholly distorting the standards for determining whether later government actions are "public and general" with only an "incidental" effect on persons contracting with the government. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). In finding that the special assessment was a "general tax," because it purportedly did not apply *only* to the government's contracting partners, the court below essentially ignored the standards set forth in *Winstar*.

In the principal opinion in *Winstar*, Justice Souter explained that the key factor in determining whether a governmental act is "public and general" for purposes of the "sovereign acts" defense is whether "a substantial part of the impact of the Government's action . . . falls on its own contractual obligations." *Winstar*, 116 S.Ct. at 2466 (plurality opinion); *see also id.* at 2467 ("the Government's capacities must be treated as fused when the Government acts in a non-general way"); *id.* at 2467 ("a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations").

When a statute, like the EPACT provision involved here, falls predominantly (at least 85%) on the government's contracting partners, a "substantial part of [its] impact" is plainly upon the government's contractual obligations. Justice Souter also explained that in evaluating impact, "[t]he greater the Government's self-interest, . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence." *Id.* at 2466. Here the EPACT assessment, by enabling the government to divert its old D&D liabilities away from its new corporation (USEC), reflects precisely the kind of "governmental object of self-relief" that Justice Souter described.

The decision below is also at odds with Justice Scalia's analysis in *Winstar*.[11] Justice Scalia found that although generally "contract law imposes upon a party to a contract liability for any impossibility of performance that is attributable to that party's own actions," *id.* at 2477 (Scalia, J., concurring in the judgment), when the government is a contracting party, a reverse presumption is more appropriate:

> [I]t is reasonable to presume (*unless the opposite clearly appears*) that the sovereign does *not* promise that none of its multifarious sovereign acts, needful for the public good, will *incidentally* disable it or the other party from performing.

Id. (third emphasis added).

A statute like EPACT that is so substantially directed at the government's own contracts easily overcomes this "reverse presumption." As Justice Scalia explained, government contractors must necessarily accept that the government's "multifarious sovereign acts, needful for the public good," may "incidentally disable" performance. *Id.* It is completely untenable to suppose, however, that the government's contracting partners understand and accept that the government can *release* itself from contractual liability simply by enacting legislation that is principally *directed* at its own contracts. Yet that is precisely the understanding that the Federal Circuit decision attributes to Yankee (and the other contracting utilities).[12]

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[11] Justice Scalia discussed the government's sovereignty-based defenses primarily in terms of the "unmistakability" doctrine, noting that the "sovereign acts" doctrine is essentially the same and "is avoided whenever [the unmistakability doctrine] would be." 116 S.Ct. at 2478 (Scalia, J., concurring in the judgment).

[12] Justice Breyer, who joined Justice Souter's opinion for the plurality in *Winstar*, also separately advocated an approach to unmistakability similar to that of Justice Scalia. 116 S.Ct. at 2472 (Breyer, J., concurring).

3. The Court's prior cases also make clear that a law is not "public and general" for purposes of the sovereign acts defense merely because it affects some persons other than the government's contracting partners. In *Perry v. United States*, 294 U.S. 330 (1935), the statute voided gold payment clauses in "every obligation," public and private, *id.* at 349, and in *Lynch v. United States*, 292 U.S. 571 (1934), the statute was a sweeping repeal of "all laws granting or pertaining to" renewable term insurance. *Id.* at 575.[13] In both cases, however, the Court held that those broad-reaching statutes improperly abrogated federal contracts—in *Perry* a government bond and in *Lynch* a veteran's insurance policy. Indeed, in *Winstar* also, the statute required deduction of "goodwill" from the regulatory capital of *all* thrifts, whether or not they had a contract with the government. 116 S.Ct. at 2446; *see* 12 U.S.C. § 1464(t)(1)(A), (9)(A) & (C); *see also* App. 28a.

The Court's Contract Clause cases also emphasize that the proper inquiry is the impact of legislation on government contract rights. In *Puerto Rico v. Russell & Co.*, 315 U.S. 610, 619 (1942), for example, the Court held that a statutory assessment imposed on the Commonwealth's prior contractors "was not a general tax" but "a clear violation of the obligation of the contracts." In *Murray v. Charleston*, 96 U.S. 432 (1878), the Court struck down a municipal statute taxing interest paid on the city's own debt, noting that "the tax must be upon all the money of the community, not upon the particular portion of it which is paid to the public creditors." *Id.* at 446.

4. The panel majority's determination that "the fixed-price terms of the contract[s here] do not constitute an

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[13] *Perry* and *Lynch* were, prior to *Winstar*, the "two principal cases of this century holding that the Government may not simply repudiate its contractual obligations." 116 S.Ct. at 2478 (Scalia, J., concurring in the judgment).

unmistakable promise on behalf of the Government that it will not impose a *general* assessment," App. 20a (emphasis added), is entirely beside the point. For reasons explained above, the EPACT special assessment is *not* a "public and general" sovereign act. It follows that the fixed-price terms of Yankee's contracts *do* protect it from the assessment, without need for any special, more "unmistakable," language. The Federal Circuit panel majority acknowledged as much in a footnote. *See* App. 21a n.8.

To require special language in government contracts protecting against governmental acts that are not "public and general" would contravene the bedrock principle of contract law that the intent of the parties to a contract controls its interpretation. As discussed above, *see* p. 12, *supra, neither* party to a government contract understands that the government may later avoid its contract obligations through legislation that is squarely *directed* at the government's contracting partners and that falls predominantly (at least 85%) on them. To imply such an understanding, as the Federal Circuit in effect did here, makes the sovereign acts doctrine superfluous and makes most government contracts illusory.[14]

5. That the EPACT special assessment violates Yankee's fixed-price contract rights does not mean that

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[14] *Lynch* and *Perry* both involved legislation that had a substantial impact on federal contract rights, and in neither case did the contracts contain—or did the Court even look for or mention—any special "unmistakable" protective contract language. No such language is necessary, as Justices Souter and Scalia also recognized in *Winstar*, where, as in this case too, the government contravenes its own contractual obligations through legislation that is *not* "public and general." Conversely, to protect against a legitimately "public and general" sovereign act, a government contract *would* have to contain special "unmistakable" language because the parties would not ordinarily understand the basic promissory language to provide such protection.

the government is powerless to raise funds necessary to decontaminate and decommission its uranium enrichment plants. To the contrary, as both the trial court and the Federal Circuit dissent recognized, the government remains free to finance its D&D effort through broader, more general taxes. App. 31a, 40a. How broad those taxes must be is not the issue here. Because the impact of this particular "tax" falls so substantially and directly on Yankee and the other utilities that were the government's contracting partners, and because that impact is so clearly contrary to the reasonable expectations of the contracting parties, the EPACT special assessment cannot possibly be considered a "public and general" act for purposes of the sovereign acts defense.

* * * *

The standard the Federal Circuit has adopted for determining when legislation is "public and general" turns the sovereign acts defense on its head. As interpreted by the court below, the sovereign acts doctrine is no longer a limited exception to the general principle that federal contracts are governed by ordinary contract law principles. Rather, by making application of the doctrine turn on whether the later law is coincident with the scope of the government's prior obligations, the decision below *invites* Congress to enact legislation that directly and deliberately impairs the rights of a majority of the government's contracting partners. The government, in that event, still can claim the defense of sovereign acts based on such a supposedly "public and general" law.

Drawing the proper line between the government's sovereign authority and its contractual obligations is often complex and difficult. In this case the task is straightforward, and the Federal Circuit has patently drawn the wrong line. A statute that targets and hits the overwhelming majority of the government's contracting partners is

not a "public and general" act. The Federal Circuit's contrary holding represents a dramatic expansion of the sovereign acts defense and conflicts with precedent of this Court.

II. THE FEDERAL CIRCUIT MISTAKENLY HELD THAT A THIRTY-YEAR RETROACTIVE MONETARY ASSESSMENT IS JUSTIFIED BY NOTHING MORE THAN THE PAST PURCHASE OF GOVERNMENT-PRODUCED SERVICES.

In 1992, Congress specifically imposed the EPACT special assessment based on the number of government-produced uranium enrichment units that utilities previously had purchased. 42 U.S.C. § 2297g-1(c), App. 47a. Under the Federal Circuit's analysis, the *sole* justification for the statute's retroactive application is that Yankee and other nuclear utility companies purchased, and therefore were the "ultimate beneficiar[ies]" of, government-produced enrichment services. App. 10a.[15] Even putting aside the fact that the utilities already had paid the agreed prices for any "benefit" they obtained from the enrichment services, the mere purchase of a government-produced product or service is not enough to justify a new monetary assessment that reopens otherwise long-settled transactions.

In prior due process decisions regarding the constitutionality of retroactive legislation, the Court has emphasized the importance of a nexus between the liability imposed by the statute and the conduct the statute targets—such as an employment relationship, which justified imposing on mine operators the retroactive requirement to pay benefits to disabled miners, *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 19-20 (1976); or participation in a multi-employer pension plan, which increased the pension

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[15] EPACT's effect is clearly retroactive because it imposes a new liability in respect of past events. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994).

plan's liability and justified imposition of retroactive withdrawal liability, *Concrete Pipe and Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 637-38 (1993). The Court thus has allowed retroactive cost spreading only to parties whose conduct makes them "responsible" for the conditions that prompted enactment of the remedial legislation. Indeed, in *Turner Elkhorn*, the Court pointed out that any legislative attempt to award retroactive compensation to workers for harm "unrelated to [a coal] operator's conduct" would present a different magnitude of constitutional "difficulties." 428 U.S. at 24.

The purchase of government-produced uranium enrichment services obviously has *some* "connection" to the D&D costs arising from the government's contamination of its enrichment plants. But it would be a considerable step to say that the purchasers can be held legally responsible for the D&D costs. Those costs, like the underlying conduct leading to contamination of the plants, were at all times within the control of the government. The government, as producer of the uranium enrichment services—not the utilities as purchasers of those services—was responsible *both* for the plant conditions *and* for assuring that the prices it charged were adequate and available to cover the costs of production.

Whether Yankee's purchase of government-produced enrichment services in these circumstances *alone* is sufficient conduct to support the retroactive EPACT assessment, even under the deferential standards recognized by the Court, is a question warranting further review. Indeed, the Court recently granted review in a case that directly raises the issue of what constitutes a sufficient nexus to justify legislative imposition of retroactive liability. *See Eastern Enterprises v. Chater*, 110 F.3d 150 (1st Cir. 1997), *cert. granted sub nom. Eastern Enterprises v. Appel*, 66 U.S.L.W. 3296 (U.S. Oct. 20, 1997) (No. 97-42). The Court thus has squarely before it the important

question "whether retroactive cost-spreading legislation violates the Due Process Clause of the Fifth Amendment as applied to a party whose conduct did not cause the economic burden the statute was designed to address." Reply Brief in *Eastern Enterprises,* No. 97-42 at 1-2.

This case is even starker, given the implications for those who do business with the government. First, unlike *Eastern Enterprises,* this case involves the government's retroactive rearrangement of its *own* financial liabilities rather than private liabilities. Under the decision below, the government can impose a retroactive monetary assessment (or other retroactive legislation) upon any person simply because he or she previously has *purchased* a government-produced product or service. If that conduct is sufficient to permit the imposition of retroactive liability for costs generated by the government in providing the purchased products or services, as the court below held, there would seem to be no limit on the government's power to reorder responsibility for its own past conduct.

Second, the extraordinary period of retroactivity in the Energy Policy Act goes far beyond what the Court has allowed. Indeed, the thirty-year reach-back of this statute works a particular hardship on petitioner, given that Yankee ceased operation of its only electricity-generating facility before EPACT was enacted. *See* App. 4a. The Act thus assesses liability for engaging in a business that petitioner does not even conduct anymore—the kind of mismatch between past and present activities that is likely to become more pronounced as the period of retroactivity lengthens.

Even in upholding retroactive legislation, the Court has specifically noted that the relevant periods of retroactivity were quite limited. *See, e.g., United States v. Carlton,* 512 U.S. 26, 32 (1994) ("Congress acted promptly and established only a modest period of retroactivity [slightly greater than one year]"); *Pension Benefit Guaranty Corp.*

v. R.A. Gray & Co., 467 U.S. 717, 731 (1984) ("Congress advanced the effective date chosen so that it would encompass only that retroactive time period [five months] that Congress believed would be necessary to accomplish its purposes").[16] Where, as here, the statute reaches back far beyond a "modest period of retroactivity," the power of Congress to reorder responsibility for completed transactions or events should be viewed with skepticism. *See United States v. Carlton*, 512 U.S. at 38 (O'Connor, J., concurring in the judgment) (period of retroactivity longer than a year "would raise . . . serious constitutional questions").

III. THE FEDERAL CIRCUIT DECISION FUNDAMENTALLY ALTERS THE PROPER BALANCE BETWEEN THE GOVERNMENT'S SOVEREIGN AUTHORITY AND THE CONTRACTUAL AND FIFTH AMENDMENT RIGHTS OF THOSE WITH WHOM IT DOES BUSINESS.

Further consideration of the significant issues presented in this case is of special importance for several additional reasons. First, the Federal Circuit's decision directly affects approximately thirty similar cases currently stayed in the Court of Federal Claims and awaiting the outcome of this case. The pending cases collectively involve more than $2 billion in special assessment amounts to be paid until the year 2007.

Second, the decision below also will have a more general impact because it is the first interpretation of *Winstar* by the only court of appeals with special jurisdiction over Tucker Act claims. The extreme views of the Fed-

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[16] *See also United States v. Darusmont*, 449 U.S. 292, 296-97 (1981) (per curiam) (the passage of retroactive legislation "confined to short and limited periods required by the practicalities of producing national legislation" is a "customary congressional practice"); *cf. Nichols v. Coolidge*, 274 U.S. 531 (1927) (invalidating tax legislation reaching back twelve years).

eral Circuit panel majority—regarding both the sovereign acts defense and Congress' retroactive powers—should at least be reviewed before they are applied more generally by the Federal Circuit and the Court of Federal Claims, the courts charged with responsibility over Tucker Act cases, and by other lower courts that may also be seeking authoritative guidance on the meaning of *Winstar*.

Finally, this case presents contract and constitutional issues significantly affecting all who do business with the federal government (and, by extension, with state and local governments as well). To the extent the decision below invites the government to retroactively rewrite the financial or other terms of its own contracts, the decision impairs the government's reliability as a contracting partner. Contractors will be deterred from dealing with the government under such circumstances. At a minimum, the decision below will "undermin[e] the Government's credibility at the bargaining table and increas[e] the cost of its engagements," results that are contrary to "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *Winstar*, 116 S.Ct. at 2459 (plurality opinion). The court of appeals' approval of the thirty-year retroactivity of the EPACT assessment also has far-reaching implications, making it difficult to discern *any* limit on the power of the government to attach new legal consequences to remote historic events.

The consequences of the Federal Circuit's decision are clear and alarming. Further review is therefore warranted.

CONCLUSION

For all these reasons, the petition for a writ of certiorari should be granted.[17]

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[17] Alternatively, if the Court elects not to grant plenary review in this case, Yankee requests that the Court defer ruling on its petition pending disposition of *Eastern Enterprises*, and then remand this case to the Federal Circuit for consideration in light of that decision. *See Lawrence v. Chater*, 516 U.S. 193 (1996).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Nos. 96-5021, 96-5025

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

May 6, 1997

Before MAYER, LOURIE, and CLEVENGER, Circuit Judges.

Opinion of the court filed by Circuit Judge CLEVENGER. Dissenting opinion filed by Circuit Judge MAYER.

CLEVENGER, Circuit Judge.

This case requires us to decide whether, in light of prior contracts specifying the price to be paid for uranium enrichment services, the Government may impose upon domestic utilities a special assessment to aid in funding the clean-up costs associated with the facilities that provided those enrichment services.

The United States appeals the decision of the United States Court of Federal Claims, *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), granting summary judgment to Yankee Atomic Electric Company (Yankee Atomic). In that decision, the court deter-

mined that the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices. We conclude that the assessment was lawful and therefore reverse.

I

As both parties acknowledge, the salient facts are not in dispute. Yankee Atomic was organized in 1954 by a number of existing utility companies in an effort to participate in the use of atomic energy as an alternative-source fuel for generating electricity. Yankee Atomic produced electricity using nuclear fuels and sold the resulting electricity to the organizing utilities, which, in turn, sold it to retail customers.

Yankee Atomic's operations required an enriched form of uranium, which was produced by separating useful isotopes of uranium from other isotopes. Beginning in 1963, Yankee Atomic purchased the uranium enrichment (or separation) services from the Government through a series of contracts. Those services were provided at enrichment plants operated first by the Atomic Energy Commission (AEC or Commission) and later by the Energy Research and Development Administration and the Department of Energy (all collectively DOE). Although these contracts varied somewhat from one to another, they each stated that the price paid by Yankee Atomic for the enrichment services would be based on "established Commission pricing policy," which was defined as the price in effect at the time the service was provided. There is no dispute that the Government fulfilled its contractual obligation to provide the enrichment services, and that Yankee Atomic fulfilled its obligation to pay the price in effect at that time.

In the late 1980s, Congress determined that it had to restructure the Government's uranium enrichment services in order to remain competitive with enrichment services

provided by other parties. It did so by creating a new, for-profit, governmental corporation called the United States Enrichment Corporation. At the same time, Congress realized that there would be large costs associated with decontaminating and decommissioning the facilities that had previously been used to provide enrichment services. The Department of Energy estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation. H.R.Rep. No. 474, pt. VIII, at 77 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2295. Because this decontamination and decommissioning fiscal problem was not recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem.

This clean-up problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992 (Energy Policy Act or Act). The Act establishes an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (Fund), which, over a 15-year period, would accumulate the monies required to clean up the old uranium enrichment plants. The Act provides that the annual deposits of $480 million (adjusted for inflation), will come from two sources: (i) up to $150 million is to be collected as a special assessment from domestic utility companies; and (ii) the balance, at least $330 million, is to come from public funds appropriated by Congress.

The Act further provides that each utility is responsible for a pro-rata share of the total annual assessment based on the percentage of uranium enrichment work units it previously purchased from the DOE relative to the total number of work units previously produced by the DOE. The Act states that a utility is considered to have purchased a work unit from the DOE if the work unit was originally produced by DOE, even if the utility actually purchased it from another source. Similarly, a utility is

not considered to have purchased a work unit from the DOE if it resold that work unit to another utility.[1] In sum, the Act imposes the assessment upon whichever utility company eventually uses the enrichment services.

Following the passage of the Act in October 1992, the DOE sought to assess Yankee Atomic's share of the annual special assessment. Yankee Atomic responded by arguing to the DOE that it should be exempted from the assessment because its facilities had shut down before passage of the Act. When the DOE rejected this argument, Yankee Atomic paid approximately $3 million pursuant to three annual assessments, and filed a lawsuit in the Court of Federal Claims seeking recovery of those payments.

II

Upon cross-motions for summary judgment, the Court of Federal Claims ruled in favor of Yankee Atomic. The court rejected the Government's contention that the special assessment was a lawful exercise of Congress's taxing power under the sovereign acts doctrine. The court explained that although the sovereign acts doctrine would have some force if the case involved a general tax that fell on all utilities alike, it had no impact in the present case which involves an assessment that "reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services." Accordingly, the court viewed the special assessment as a unilateral retroactive increase in the price previously charged by the Government for its uranium enrichment services.

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[1] These provisions were designed to take into account the secondary market that existed for uranium enrichment services, wherein some utilities purchased uranium enrichment work units from the Government and resold them to other utilities. Yankee Atomic purchased a portion of its uranium enrichment services through this secondary market, but does not assert any breach of contract, taking, or unlawful exaction claim concerning its monetary liability under the Act for those purchases.

The court explained that such a retroactive price increase would constitute an unlawful exaction in view of the prior contracts between the Government and Yankee Atomic. Because those prior contracts specified a fixed price for the uranium enrichment services, the "economic benefit which [Yankee Atomic] gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away." 33 Fed. Cl. at 585.

Based on this conclusion, the court granted Yankee Atomic's motion for summary judgment without addressing Yankee Atomic's argument that it was exempt from the assessment because its facilities had closed before passage of the Act. We review the Government's appeal, and Yankee Atomic's cross-appeal, from the judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (1994).

III

The decision of the Court of Federal Claims is driven by its characterization of the special assessment as a retroactive price increase rather than an exercise of the sovereign's taxing power, and the parties' dispute over this characterization frames the dispositive issue of this appeal.

The Government's principal argument is that the special assessment is entirely distinct from the prior contracts between the DOE and utility companies such as Yankee Atomic. The Government notes that those earlier contracts concerned uranium enrichment, whereas this assessment concerns decontamination and decommissioning. As a result, the Government asserts that the assessment cannot constitute a breach of those earlier contracts unless those contracts contained an express provision that precluded the Government from imposing an assessment to fund decontamination and decommissioning costs.

Yankee Atomic disagrees with the Government's characterization of the assessment and contends that it is di-

rectly related to the earlier contracts. Yankee Atomic contends that the fixed-price nature of those contracts expressly limited its obligation to the price already paid, and shifted the risk of any additional costs (including decontamination and decommissioning costs) onto the Government. Yankee Atomic argues that the assessment breaches those contracts by, in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services.[2]

Resolution of this disputed characterization requires us to consider and apply two related bodies of law: the sovereign acts doctrine and the unmistakability doctrine. We consider each in turn.

IV

The sovereign acts doctrine stems from a series of decisions by the Court of Claims, and was first recognized by the United States Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In that case, Horowitz submitted a bid to buy certain Habutai silk offered for sale by the Government. The Government agreed that Horowitz would be given the opportunity to re-sell the silk before paying the purchase price, and agreed to ship the silk within a day or two after shipping instructions were given. *Id.* at 459, 45 S.Ct. at 344. Horowitz sold the silk to a silk company, paid the balance of the purchase price, and requested that the silk

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[2] Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government.

be shipped to the silk company at once. Because of a governmental embargo placed on the shipment of silk by freight, however, the silk was not shipped for several weeks. By the time it arrived, the price of silk had dropped significantly, and the consignee refused to accept delivery. As a result, Horowitz was forced to sell the silk at a loss. *Id.* at 460, 45 S.Ct. at 344.

Horowitz sued the United States, contending that the embargo breached the valid contract he had for sale and shipment of the silk. The United States Supreme Court rejected this argument because "[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Id.* at 461, 45 S.Ct. at 344. The Court adopted the reasoning of the Court of Claims:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. *Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.* . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work injury to some private contractors, such parties gain nothing by having the United States as their defendants.

Id. (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)) (emphasis added).[3]

[3] The Court of Claims expressed this same philosophy in *O'Neill v. United States*, 231 Ct.Cl. 823, 826 (1982), as follows:

The Supreme Court recently discussed *Horowitz*, and the sovereign acts doctrine in general, in *United States v. Winstar Corp.*, —— U.S. ——, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).[4] In *Winstar*, the plurality explained that the doctrine is designed to distinguish between the Government's twin roles as contractor and sovereign. *Id.* at ——, 116 S.Ct. at 2463. When the Government enters into a contract, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at ——-——, 116 S.Ct. at 2464-65. The Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.

> From its earliest days . . . application of the sovereign act[s] doctrine has proceeded from the recognition that in governing the country, the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts. Were those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party *for the governing action.* Given the large number of contracts the Government enters, *its* contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act[s] doctrine is that in those circumstances, *the Government in its contracting role, like its private counterpart, should not incur liability for its act done in the governing role.*

[4] The sovereign acts doctrine has also been cited in several other cases since *Horowitz*. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46, 102 S.Ct. 894, 905-06, 71 L.Ed.2d 21 (1982) (discussing that the petitioners confuse the Tribe's role as commercial partner with its role as sovereign); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed.Cir.1990) (explaining that the Uranium Mill Tailings Radiation Control Act was a sovereign act undertaken for the public good and, therefore, could not form the basis for a party's breach of contract claim).

On the other hand, the plurality explained, the Government-as-sovereign must remain free to exercise its powers. For this reason, the early Court of Claims cases "thought it 'grave error' to suppose that 'general enactments of Congress are to be construed as evasions of [the plaintiff's] particular contract.'" *Id.* at ——, 116 S.Ct. at 2464 (quoting *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865)). The sovereign acts doctrine attempts to "balance[] the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." [5] *Id.* at ——, 116 S.Ct. at 2465. Thus, it is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.

Under the sovereign acts doctrine, therefore, we must decide whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public). We conclude it was the latter.

As explained above, we must begin by examining the scope of the Energy Policy Act; only then can we determine whether the Act is designed with the purpose of

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[5] The concurring and dissenting justices agreed with this general statement of the doctrine. Under the facts of *Winstar*, *see infra* section IV.A, only three justices concluded that the congressional act was not a sovereign one (*i.e.*, the act was attributable to the Government-as-contractor). The remaining justices either viewed the act as a sovereign one or decided the case on another basis.

affecting or altering the Government's prior contracts. The Energy Policy Act requires contribution to the Fund from any domestic utility that purchased separative work units from the DOE before the Act's passage. 42 U.S.C. § 2297g-1(c) (1994). Importantly, however, the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services, because the Act *does not* require contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility. *See* 42 U.S.C. § 2297g-1(c)(2). In contrast, the Act *does* require contribution from any utility that did not have a contract with the DOE but nonetheless benefited from the DOE's services by purchasing through the secondary market. *See* 42 U.S.C. § 2297g-1(c)(1). Thus, some utility/Government contracts are not embraced by the Act, while some purchases from private entities are covered. The key is whether the purchaser was the ultimate beneficiary of the DOE's services.

The reach of the Act, therefore, makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements. Rather than targeting those utility companies that had prior contracts with the Government, the Act targets whichever utility eventually used and benefited from the DOE's enrichment services. Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed. *Cf. Atlas Corp.*, 895 F.2d at 748 (noting that the dangers and clean-up costs associated with uranium milling operations were not fully recognized until the late 1970s). It did so by dividing the costs between: (i) the Government, which was responsible for at least $330 million per year to be raised through general appropriations, and (ii) those domestic utilities that benefited from the DOE's uranium enrichment services. Any impact that this approach may have on those utilities with which the Government had prior contracts is "merely in-

cidental to the accomplishment of a broader governmental objective." *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2466.

In characterizing the essence of the Act, Yankee Atomic focuses only on the provisions that impact those utilities that contracted with the Government and that themselves used the enrichment services. While it is true that Yankee Atomic has no quarrel with the Government over its liability on consumption of enrichment services supplied by non-governmental entities through the secondary market, that fact cannot render irrelevant the Act's provisions that reach even those utilities that did not contract with the Government. When construing an act of Congress, and especially when determining the essential characteristic of a particular statute, we must observe and understand the statute as a whole. *See Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act."); *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A.1982) ("Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole, and it is not proper to confine interpretation to the one section to be construed." (citation omitted)). Statutory provisions that are relevant, or as here, controlling, to our interpretation cannot be ignored simply because they are not dispositive to the facts before us.

Similarly, the opinion of the Court of Federal Claims seems to have been mistaken in reasoning: "The [sovereign acts doctrine] argument would have some force if we were dealing with a general tax that fell on all utilities

alike. That, however, is not our case. Rather, *this special assessment reaches only those utility companies that previously had contracted with the Government* for the purchase of uranium enrichment services." 33 Fed. Cl. at 585 (emphasis added). As explained above, the special assessment does not reach only those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had *no* contracts with the Government. Ironically, then, the assessment appears to be very similar to what the Court of Federal Claims thought it was not: a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services.[6]

The broad reach of the Energy Policy Act also distinguishes the present case from two cases upon which

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[6] To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs. One such example involves the costs of cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et. seq. (1994). *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.1986). The defendants in those lawsuits have frequently challenged the retroactive application of CERCLA as a violation of their due process rights and as an unconstitutional taking. The courts, however, have rejected those arguments. *See id* at 734 (rejecting due process challenge because "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

Yankee Atomic contends that the CERCLA cases, and others like them, are inapposite because they involve the impact of legislation on private parties and therefore do not implicate the Government's self-interest. *See Perry v. United States*, 294 U.S. 330, 350-51, 55 S.Ct. 432, 434-35, 79 L.Ed. 912 (1935). We cite the CERCLA cases not for their insight as to Congress's motives in enacting the Energy Policy Act, but rather for their general proposition that the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem.

Yankee Atomic and the Court of Federal Claims relied: *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

In *Lynch*, the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the prescribed monthly premiums. 292 U.S. at 576, 54 S.Ct. at 842. Congress subsequently enacted the Economy Act which included a clause stating: "All laws granting or pertaining to yearly renewable term insurance are hereby repealed." *Id.* at 575, 54 S.Ct. at 842. The Supreme Court held the legislation unlawful without discussing the sovereign acts doctrine, which is not surprising given that the clause was clearly directed to abrogating past war risk insurance contracts for reasons of economy. As the Court stated: "No doubt there was in March, 1933, great need of economy. . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580, 54 S.Ct. at 844.

In *Perry*, the plaintiff owned a $10,000 government bond which, when redeemed, required the United States to pay in "gold coin of the present standard of value." 294 U.S. at 346-47, 55 S.Ct. at 433. Congress later passed a joint resolution which stated that payment of obligations in gold was against public policy and, therefore, all obligations shall be discharged by payment in currency that is legal tender. *Id.* at 349, 55 S.Ct. at 434. The enactment specifically stated that "provisions for payment in gold, 'contained in any law authorizing obligations to be issued by or under authority of the United States,' were repealed." *Id.* Based on this clear expression of an intention to abrogate past contracts, the Court again held the act unlawful without discussing the sovereign acts doctrine.

In sum, *Lynch* and *Perry* both involved situations where the congressional act made clear that its purpose was, at

least in part, to abrogate past public contracts. The Energy Policy Act, in contrast, reveals no such purpose of targeting past contracts. Instead, the Act taxes all beneficiaries of the DOE's uranium enrichment services.

Given the focus of the relevant provisions of the Energy Policy Act, we conclude that it constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services. This conclusion does not end our inquiry, however. We must further consider whether the Government, by contract with Yankee Atomic, has surrendered the right to exercise this sovereign power "in terms which admit of no other reasonable interpretation." *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907. This requires us to consider and apply the unmistakability doctrine.

V

As the Supreme Court plurality recently explained in *Winstar*, the modern unmistakability doctrine "marks the point of intersection between two fundamental constitutional concepts." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2453. One concept, which developed in England, is that of parliamentary sovereignty. This concept posits that because the legislature has absolute authority and acknowledges no superior power, it cannot be bound by acts of a prior legislature. *Id.* The other concept, which developed in the United States, is that legislative power may be limited under certain circumstances. Unlike the absolute power enjoyed by the Parliament in England, the legislature in the United States is "subject to the overriding dictates of the Constitution and the obligations that it authorizes." *Id.* at ——-——, 116 S.Ct. at 2453-54. One such limitation is that embodied in the Contracts Clause, which prohibits a state from passing any law that impairs the obligation of contracts. *See* U.S. Const., Art. I, § 10, cl. 1.

Although the Contracts Clause does not apply to acts of the United States, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. . . . The extent of that capacity, to be sure, remains somewhat obscure." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2455 (citations omitted).

The modern unmistakability doctrine is a canon of construction that attempts to balance these two somewhat competing concepts by allowing the Government to make agreements that bind future Congresses, but only if those contracts contain an unmistakable promise. Thus, the plurality in *Winstar* summarized the almost 160-year history of the unmistakability doctrine as follows:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

Id. at ——, 116 S.Ct. at 2456.[7]

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[7] The remaining justices in *Winstar* essentially agreed with this formulation of the doctrine, although they disagreed with its application to the facts of that case. The two dissenting justices viewed the doctrine to embody the notion that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *Id.* at ——, 116 S.Ct. at 2480 (Rehnquist, J., dissenting). The three concurring justices stated the doctrine as follows:

> [I]t is reasonable to presume (unless the opposite clearly appears) that the sovereign does not promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable it or the other party from performing one of the promised acts. . . . Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts

In *Winstar*, the justices were divided as to whether or not the unmistakability doctrine was even applicable, given the facts of that case. Therefore, we next address the issue of whether the doctrine is applicable under the facts of the present case.

A

The plurality of justices in *Winstar* decided that the unmistakability doctrine was not applicable. *Winstar* involved the fallout from the crisis involving the savings and loan industry in the late 1970s and early 1980s. The Government induced healthy thrifts to merge with ailing ones by agreeing to provide favorable regulatory treatment, which would allow the healthy thrifts to count towards their capitalization requirements certain "supervisory goodwill" generated by the mergers. *Winstar*, —— U.S. at ——-——, 116 S.Ct. at 2442-43. This scheme, however, was ultimately unsuccessful in resolving the thrift industry crisis. As a result, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which required that all thrift institutions no longer use "supervisory goodwill" to meet their capitalization requirements. This immediately caused several thrifts to fall out of compliance with capitalization requirements, thereby making them subject to seizure by thrift regulators. *Id.* at ——, 116 S.Ct. at 2446. The thrifts filed suit claiming breach of contract.

After reciting the history of the unmistakability doctrine, the *Winstar* plurality stated:

> The cases extending back into the 19th-century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered a sovereign power (e.g., to tax or control

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must be interpreted in a common-sense way against that background understanding.

Id. at ——, 116 S.Ct. at 2477 (Scalia, J., concurring).

> navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power. . . . *The application of the doctrine thus turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government.*

Id. at ——-——, 116 S.Ct. at 2456-57 (footnote omitted; emphasis added). The plurality held that the doctrine was inapplicable because the contracts with the thrifts did not preclude the Government from later exercising its sovereign powers. Instead, the contracts merely shifted the risk of loss onto the Government, thereby requiring it to "indemnify its contracting partners against financial losses arising from regulatory change." *Id.* at ——, 116 S.Ct. at 2461.

Five justices disagreed with the plurality's conclusion that the unmistakability doctrine was not available simply because the contracts were risk-shifting agreements. The three concurring justices pointed out that the plurality's approach was inconsistent with precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at ——, 116 S.Ct. at 2476. Moreover, "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Id.* Despite this difference, these three justices concurred because they believed that the contracts contained unmistakable promises to continue the favorable regulatory treatment. *Id.* at ——-——, 116 S.Ct. at 2477-78. The two dissenting justices concluded that the doctrine applied and that the contracts did not contain an unmistakable promise against future regulatory change.

Based on the reasoning contained in the *Winstar* opinions, we conclude that the unmistakability doctrine applies in the present case. This conclusion respects the views of

the five justices who stated that the application of the doctrine is unrelated to the nature of the underlying contracts. In addition, our conclusion is in harmony with the views of the plurality justices. To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine. As mentioned above, the contracts at issue are fixed-price contracts, and the Supreme Court has held that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918). Similarly, our predecessor court has stated that "the [seller] in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs., Inc. v. United States*, 207 Ct. Cl. 743, 524 F.2d 680, 691 (1975) (citations omitted).

Importantly, however, the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government. *Winstar*, —— U.S. at ——-——, 116 S.Ct. at 2457-58. As explained above, the assessment at issue in the present case is a general, sovereign act. Although Yankee Atomic seeks money damages, its argument would effectively block the exercise of this sovereign power to tax, for if Yankee Atomic were to prevail, the Government would be required to refund the entire amount assessed. This is akin to a tax rebate, which even the plurality seemed to recognize as a block to the exercise of sovereign power. *See id.* at ——, 116 S.Ct. at 2458 ("Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power.").

B

Having decided that the unmistakability doctrine applies, we next address the merits of the arguments on that issue. This requires us to decide whether the contracts between Yankee Atomic and the Government unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax. We conclude that no such promise existed in the contracts.

We begin by noting that none of the contracts expressly states that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole. Yankee Atomic acknowledges the lack of any such express statement, but instead relies on the fixed-price nature of the contract. Yankee Atomic argues that "[t]he fixed-price contract terms are hardly implicit, and they *forbid* a future price increase." Although the contracts include fixed-price terms, we must determine whether those terms unmistakably encompassed future taxes or assessments.

To determine the scope of those fixed price terms, we look to the language of the contracts. Although the language of the several contracts varies somewhat, the contract executed on March 9, 1971, entitled "Agreement For Furnishing Uranium Enrichment Services" is representative. Article III of that agreement provides, in part:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of

> separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

From examining the contracts, we decide that the fixed-price terms of the contract do not constitute an unmistakable promise on behalf of the Government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services. The language of the contract is directed at the prices charged for providing enriched uranium to Yankee Atomic, and not to any decontamination or decommissioning costs which may subsequently arise. Thus, the contract states that "[t]he charges [are] to be paid to the Commission *for enriching services provided*," and sets a ceiling price of $30 per Kg unit "for separation of U-235 from U-238."

The Government complied with this provision by providing the enriched uranium at the agreed-upon price. At that point, the contract was fully performed by both parties. This gave Yankee Atomic a vested contract right which would then bar the Government from deliberately attempting to charge more for performance of those contracts. As explained above in the sovereign acts doctrine discussion, however, the subsequent assessment is not a deliberate retroactive increase in the price of those contracts. Instead, it is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government.

The opinion of the Court of Federal Claims is not clear as to whether or not it discerned an unmistakable promise that barred the subsequent special assessment. On the one hand, after reciting several unmistakability doctrine cases, the court stated: "*But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation*, exercise of the

sovereign power does not proceed unchecked." 33 Fed. Cl. at 584. The underscored portion of this statement indicates that the court viewed the contracts as containing no unmistakable promise that precluded the Government from later imposing an assessment.

On the other hand, the court's opinion can be read to indicate that it found such an unmistakable promise. The court explained that the congressional acts required the AEC to charge prices that assured reasonable compensation to the Government, which was later defined as recovery of the Government's costs over a reasonable period of time. Based on these legislative mandates, the court stated: "[i]n short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services." 33 Fed. Cl. at 584. This indicates that the court implied an unmistakable promise from legislative mandates. To the extent that the Court of Federal Claims implied an unmistakable promise from the legislative acts, we conclude it erred. Put simply, a specific promise implied from general legislative acts is not an unmistakable one.

Therefore, we conclude that the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services.[8]

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[8] Our conclusion on this point also resolves Yankee Atomic's takings argument. Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase. For the same reason, *Lynch* and *Perry* are inapposite. In each of those cases, the

VI

Yankee Atomic also contends that even if we should rule against it on its contractual arguments, it should nonetheless prevail on its statutory argument. Yankee Atomic argues that the Energy Policy Act applies only to "domestic utilities," and that the meaning of that term is provided by the following language:

> Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

42 U.S.C. § 2297g-1(g). Yankee Atomic argues that this language plainly indicates that "domestic utility" encompasses only those utilities that are currently generating and selling electricity. Because Yankee Atomic ceased operation eight months before passage of the Act, it is not a "domestic utility." As a result, Yankee Atomic asserts that the entire assessment, including that levied on Yankee Atomic's purchase in the secondary market, would constitute an unlawful exaction. We disagree with this argument.

The plain language of the Energy Policy Act explains which utilities are covered by its scope. The Act clearly states that "[t]he Secretary shall collect a special assessment from domestic utilities." 42 U.S.C. § 2297g-1(c). The Act further states that a utility is responsible for contribution to the Decontamination and Decommissioning

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Government's action directly abrogated prior vested contractual rights. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2455 (stating that "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and citing *Perry* and *Lynch*).

Fund if it purchased uranium enrichment services from the DOE, either directly or indirectly, but utility company [sic]. 42 U.S.C. §§ 2297g-1(c)(1), (2). Thus, the plain language of the statute sets the parameters of its scope. Because Yankee Atomic purchased uranium enrichment services from the DOE, both directly and indirectly, it falls within the Act's scope.

The provision cited by Yankee Atomic, § 2297g-1(g), does not contradict this plain meaning. That provision merely addresses the issue of how the special assessment should be treated in determining utility rates. By defining the assessment as a current cost of fuel, Congress clears the path for the domestic utilities to pass through the assessment to current customers. This avoids any complications from the Federal Energy Regulatory Commission, which has ruled that although customers can be charged for current fuel costs, they cannot be charged for certain prior costs. *See, e.g., Northern States Power Co.*, 58 FERC ¶ 61,119 (Feb. 6, 1992). Section 2297g-1(g) does not, however, *sub silentio* create an exception which takes certain utilities out of the reach of the assessment.

Therefore, we conclude that Yankee Atomic is not exempt from the assessment by virtue of its nonoperating status at the time the Act was passed. The Act plainly defines the scope of the assessment, and Yankee Atomic has not cited any contrary intention by Congress.

VII

In conclusion, the provision of the Energy Policy Act which imposes the special assessment is a sovereign act because it is designed to spread the costs associated with the decontamination and decommissioning over all domestice utilities that used the DOE's uranium enrichment services, rather than targeting only those utilities that had contracts with the Government. Moreover, the contracts between Yankee Atomic and the Government did not con-

tain an unmistakable promise which precluded the Government from exercising this sovereign power. Finally, Yankee Atomic is not exempt from the assessment by virtue of the fact that it ceased operations before the Act's passage. Accordingly, the judgment of the Court of Federal Claims is reversed.

No costs.

REVERSED.

MAYER, Circuit Judge, dissenting.

More than a century ago, the Supreme Court held that the government cannot deprive a party with which it contracts "of the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879); *see also Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55, 106 S.Ct. 2390, 2398, 91 L.Ed.2d 35 (1986). In levying the special assessments required by 42 U.S.C. § 2297g-1 against Yankee Atomic Electric Company (Yankee), the government improperly diminished the value of Yankee's contractual "fruits." The Court of Federal Claims held that this was an "unlawful exaction," and I agree. I would affirm.

The parties do not dispute that the contracts at issue were fixed-price contracts. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918); *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed.Cir.1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). As the seller of uranium enrichment services, the government bore the risk of any unforeseen difficulties or increased costs that might arise out of its performance of the contracts.

The parties also agree that the contracts were fully and satisfactorily performed. Once a contract is completed, the contractual relationship ends and there is no privity between the parties. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167-68 (Fed.Cir.1994); *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1541 (Fed.Cir.1987).

Consequently, Yankee cannot prevail on its claim that the government breached the contracts at issue years after they were finished. *See Mulholland v. United States*, 175 Ct.Cl. 832, 361 F.2d 237, 239-40 (1966) (at the latest, a breach of contract claim accrues when the contract is completed); *cf. Henke v. United States*, 60 F.3d 795, 799-800 (Fed.Cir.1995).

Contracts, however, are property, "whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment" of the United States Constitution. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); *see also Bowen*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (the government "has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984) ("[V]alid contracts are property within meaning of the Taking Clause."); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 278 n. 31, 89 S.Ct. 518, 524 n. 31, 21 L.Ed.2d 474 (1969). The Fifth Amendment prohibits the federal government from depriving a person of property "without due process of law" and from taking private property "without just compensation." U.S. Const. amend. V; *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843; *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980) (where state collected a service charge, subsequently-imposed fee for the same service was an unconstitutional taking).

The government does not contend that its contracts with Yankee were invalid. So, there can be no doubt that once Yankee's contracts had been satisfactorily performed, its rights under those contracts were fully-vested property rights. Consequently, the government cannot deprive

Yankee of the benefits of those contracts. *See Sinking Fund Cases*, 99 U.S. at 720.

To ascertain Yankee's vested property rights, we must look to the contracts themselves. The bargain struck between the government and Yankee was simple. The government, through the Atomic Energy Commission and its successor agencies, was to provide uranium enrichment or separation services for Yankee. In return, Yankee was to pay a fixed price per separative work unit, the common measure by which uranium enrichment services are sold. Between 1963 and 1983, Yankee purchased approximately 804,000 separative work units at prices ranging from less than $26 to more than $149 per unit. Because of the fixed-price nature of these contracts, Yankee was entitled to pay no more than the agreed-upon price. The government, on the other hand, was assigned the risk for any unforeseen difficulties that might arise or the risk that actual performance costs would be higher than the contract price.

The sole basis upon which Congress imposed the special assessments which Yankee seeks to recover is that Yankee had purchased uranium enrichment services from the government. These assessments were calculated based on the percentage of the total separative work units produced by the government which Yankee had purchased directly. This is tantamount to a retroactive price increase. It levies a charge on Yankee solely because it had previously purchased enrichment services from the government. But those purchases were made via fixed-price contracts. The assessment effectively requires Yankee to pay for the additional costs the government incurred as a result of performing uranium enrichment services; the very same costs for which the government assumed the risk. Thus, the government retroactively abrogated the essence of the contracts at issue. "But Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to

lessen government expenditure would be not the practice of economy, but an act of repudiation." *Perry*, 294 U.S. at 352-53, 55 S.Ct. at 436.

It is of no moment that the reason for the assessment is to relieve the government from shouldering entirely the unforeseen costs incurred in providing those services, from which Yankee had benefited. Yankee fully paid the government for those benefits, and as the seller of the enrichment services, the government bore the burden for any unforeseen costs. The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *cf. United States v. Winstar Corp.*, —— U.S. ——, ——, 116 S.Ct. 2432, 2459, 135 L.Ed.2d 964 (1996) (the government may not "simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change").

Nor is it of any great import that the assessment is levied on some utilities that did not contract directly with the government. First, that is not the case before us. Yankee seeks to recover only assessments based on its direct purchases from the government. It does not challenge charges based on secondary market purchases, which, according to the government at argument, constitute just 15% of the total assessments. Moreover, the same argument, that legislation was not targeted solely at those with whom the government had contracted, was made by the government and rejected by the Court in *Winstar*. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." —– U.S. at ——, 116 S.Ct. at 2468. The government

concedes that 85% of the special assessment falls on utilities that had procured enrichment services directly from the government. Clearly then, the assessment's impact falls substantially on the government's contracting partners. That a small fraction of others who indirectly purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.

The government invokes the familiar sovereign acts and unmistakability doctrines in support of its position that the special assessment did not abrogate Yankee's vested contract rights. Neither shields the government.

The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). "[T]he essential point [of the doctrine is] to put the Government in the same position that it would have enjoyed as a private contractor." *Winstar*, —— U.S. at ——, 116 S.Ct. at 2463. This doctrine is wholly inapplicable. Properly understood, it is a government defense to breach of contract and other contractor claims that a governmental act adversely affected contract performance. But this is not a breach of contract case. Nor did Congress' enactment of the special assessment obstruct performance of the contracts, as contemplated by *Horowitz*. The contracts were fully and successfully performed by both parties. But even assuming the doctrine applied, it would not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2469 ("[T]he extent to which [the legislation there at issue] relieved the Government of its own contractual obligations precludes a finding that the

statute is a 'public and general' act for purposes of the sovereign acts defense.").

The unmistakability doctrine, on the other hand, is simply a "canon of contract construction," *Winstar*, —— U.S. at ——, 116 S.Ct. at 2448, which says that "a contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress)," *id.* at ——, 116 S.Ct. at 2456. Its application "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power," such as the power to tax. *Id.* at ——, 116 S.Ct. at 2457. But this doctrine too is inapplicable. It is not enforcement of a "contractual obligation," per se, that is at issue. Rather, Yankee seeks reimbursement for the improper abrogation of its vested property rights, which happened to arise out of the completed contracts. That is, it seeks money damages for the government's deprivation "of the fruits actually reduced to possession" of the contracts at issue. *See Sinking Fund Cases*, 99 U.S. at 720.

Even assuming, for the sake of argument, the unmistakability doctrine applied, it adds little. The parties agree that the contracts, out of which Yankee's property rights arose, had fixed prices and that the government bore the risk of unforeseen costs that might arise. They merely disagree about the legal consequences that flow from this interpretation. But Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike. It did not need an additional, second promise not to have the contract price increased after completion. *See Winstar*, —— U.S. at ——, 116 S.Ct. at 2461 (there is "no need for an unmistakably clear 'second promise' "); *id.* at ——, 116 S.Ct. at 2477 (Scalia, Kennedy, Thomas, JJ., concurring) (there need be no "*further* promise not to go back on the promise" made).

That is not to say that Yankee would be immune from every assessment or tax relating to decontaminating and decommissioning the government enrichment facilities, no matter how general or broad its application, solely because it had a fixed-price contract. But where, as here, the impact of the tax falls so substantially and directly on Yankee and the government's other contracting partners, it amounts to a retroactive price increase, which cannot stand.

When the government improperly exacts or takes one's money " 'in contravention of the Constitution, a statute, or a regulation,' " an illegal exaction has occurred, and the payor is entitled to recoupment. *Aerolineas Argentinas v. United States,* 77 F.3d 1564, 1572-73 (Fed.Cir.1996); *Eastport S.S. Corp. v. United States,* 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). In other words, "an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' " *Aerolineas Argentinas,* 77 F.3d at 1573 (quoting *Clapp v. United States,* 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (1954)). The government has Yankee's money in its pocket. It illegally exacted that money in contravention of Yankee's rights under the Fifth Amendment. Yankee is entitled to recover it.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5021

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

JUDGMENT

On Appeal from the United States Court of Federal Claims *in Case No(s).* 94-555

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

REVERSED

DATED May 6, 1997

ENTERED BY ORDER
OF THE COURT

/s/ Jan Horbaly
JAN HORBALY
Clerk

ISSUED AS A MANDATE: August 22, 1997

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

No. 94-555 C

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff,

v.

THE UNITED STATES,
Defendant.

June 22, 1995

OPINION

WIESE, Judge.

Title 42 of the United States Code, section 2297g-1(c) (1988 & Supp. IV 1992), authorizes the Secretary of Energy to collect a special annual assessment from those domestic utilities which, in prior years, had utilized enriched uranium, produced by the Government, as a fuel in the operation of their nuclear-powered electricity generating facilities. The assessment is paid into a fund intended to meet the costs of decontaminating and decommissioning the industrial facilities that the Government used in producing the enriched uranium.

Plaintiff is among the utilities subject to this special assessment; its suit here seeks recovery of a portion of the approximately $3,000,000 it has thus far paid the Government.[1] Three theories of recovery are advanced. First,

[1] The statute authorizes the assessment to be calculated on the basis of all Government-produced enriched uranium utilized by a

plaintiff maintains that the assessment amounts to a breach of contract, in that it retroactively increases the cost of the Government's uranium enrichment services, thereby violating the "fixed-price" character of the contracts under which those services initially were obtained. Second, even if imposition of the assessment does not amount to a breach of contract, plaintiff claims, it constitutes the deprivation of a contract-based advantage and hence, the taking of a property right. Finally, putting both contract and taking theories aside, plaintiff argues that Congress intended the assessment to apply only to those domestic utilities able to recover the cost involved through their rate base, that is, as a pass-through of a necessary and reasonable cost of fuel. And inasmuch as plaintiff ceased operations in early 1992, some eight months prior to the passage of the legislation authorizing the special assessment, it argues that the assessment represents an unlawful exactitude.

Defendant disagrees with these contentions; it maintains that the assessment represents a legitimate exercise of legislative authority that does not transgress plaintiff's contract rights or implicate the Takings Clause of the Fifth Amendment or violate the terms of the statute authorizing the special assessment.

Both sides have moved for summary judgment supported by written briefs, later supplemented by oral argument. At the conclusion of the argument, heard June 1, 1995, the court issued a tentative ruling in plaintiff's favor and indicated its intention to address the issues more completely in a written decision. This opinion proceeds in accordance with the court's earlier ruling.

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domestic utility, whether purchased from the Government directly or from secondary market sources. 42 U.S.C. § 2297g-1(c)(1). In this suit, however, plaintiff seeks repayment only of that portion of the annual assessment attributable to its direct purchases from the Government pursuant to contracts entered into in 1963, 1969, and 1971.

FACTS

Until the shutdown of its operations in early 1992, plaintiff operated as a domestic utility engaged in the wholesale distribution of electrical power generated from nuclear fuels. The company, located in Rowe, Massachusetts, was organized in 1954 by a number of existing electric utility companies to facilitate their joint participation in the then-emerging use of atomic energy as an alternate-source fuel for the generation of electricity. The electricity produced by plaintiff was sold to its shareholder members (the organizing utilities) for redistribution to retail customers, both residential and commercial.

In the conduct of its business, plaintiff purchased uranium enrichment services from the Government. These purchases, which began in 1963, were carried out through successive multi-year contracts between plaintiff and the Atomic Energy Commission (AEC) and successor agencies, including the Department of Energy (DOE). Although the types and terms of the contracts varied over time, their constant feature was a pricing provision which set the charge for the Government's services in accordance with "established Commission pricing policy," that is, at the price in effect at the time the service was provided, subject, however, to a stated maximum amount.

Typical of this contract language was the provision that appeared in the "Agreement For Furnishing Uranium Enrichment Services" which the parties executed on March 9, 1971. Article III of this agreement specified in relevant part that:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement

> shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

The term "established Commission pricing policy" was defined in the contract to mean "any applicable price or charge in effect at the time of performance of any services under this agreement (i) published by the Commission in the Federal Register for material or services subject to this agreement, or (ii) in the absence of such a published figure, determined in accordance with the Commission's Pricing Policy. . . ."

The regulatory agencies involved in managing the Government's uranium enrichment program (the Atomic Energy Commission and successor agencies), either failed to price, or were competitively disabled from pricing, their services high enough to pay for the future cleanup of the radiation contamination at the facilities where the enrichment services were being performed. H.R.Rep. No. 474, 102d Cong., 2d Sess., pt. I, at 142, 144; pt. VIII, at 76, 78 (1992), *reprinted in* 1992 U.S.C.C.A.N.1953, 1965, 1967, 2294, 2296.

This problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (the Act). Specifically, Title XI of the Act (106 Stat. 2951) amended the Atomic Energy Act of 1954 to provide, *inter alia*, for the creation of a fund—the Uranium Enrichment Decontamination and Decommissioning Fund—to accumulate, over a fifteen year period, the monies necessary for the cleanup costs of the uranium enrichment plants. (This amendment is now codified at 42 U.S.C. § 2297g.) The Act further provided that contributions to the fund, amounting to $480,000,000 annually, were to come from two sources: up to $150,000,000 annually was to be

collected by "special assessment" from domestic utilities; the balance, from general appropriations. The Act also provided that each domestic utility's share of the total annual assessment was to be determined on a per-unit basis (called a separative work unit) representing the measure of that utility's past use of uranium enrichment services provided by the Government. (This amendment is now codified at 42 U.S.C. § 2297g-1.)

Following passage of the Act in October 1992, the Department of Energy proceeded to assess plaintiff a share of the annual special assessment. Plaintiff took the position that it was not liable for the assessment because it no longer was an operating utility—the Rowe, Massachusetts facility having been shut down permanently in February 1992—and therefore did not come within the intended reach of the Act. Essentially, it was plaintiff's view that because the Act specifically authorized recovery of the special assessment through a utility's rate base, it necessarily contemplated an assessment that was meant to apply only to operating utilities.[2]

DOE rejected the position urged by plaintiff. The Agency concluded that the Act applied to all utilities that had used government-enriched uranium in their generating facilities without regard to their current operating status. The Agency saw the statutory language relied on by plaintiff as simply an accounting authorization designed to overcome the potential rate-making problems inherent in having present utility consumers bear costs more logically assignable to past consumption.

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[2] The argument was founded on the language of 42 U.S.C. § 2297g-1(g), a section titled "Treatment of Assessment." That language reads as follows:

> "Any special assessment levied under this section . . . shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost."

On August 19, 1994, four days after the rejection of plaintiff's bid for exemption, plaintiff filed suit in this court. As of that date, the Government had collected from plaintiff, pursuant to the authority of 42 U.S.C. § 2297g-1, three annual assessments amounting to approximately $3,000,000.00. Plaintiff seeks recovery of a portion of this sum together with interest, costs and attorneys' fees.

DISCUSSION

Our analysis of this case begins with the rule that contracts with the United States, like contracts between private parties, "remain subject to subsequent legislation by the presiding sovereign." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982). As the Court explained in *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts subject to the sovereign's jurisdiction, and will remain unless surrendered in unmistakable terms.' " *Id.* at 52, 106 S.Ct. at 2397 (quoting *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907). Thus, "one who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms." *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618 (D.C.Cir.1992) (quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 47, 112 L.Ed.2d 24 (1990)).

But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation, exercise of the sovereign power does not proceed unchecked. That power, the Court has also declared, may not be relied upon to "take away property already acquired under the operation of [a contract], or to deprive [a] corporation of the fruits actually reduced to possession of contracts lawfully made."

Bowen, 477 U.S. at 55, 106 S.Ct. at 2398 (quoting *Sinking-Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496, 25 L.Ed. 504 (1878)). And, as the *Bowen* decision further points out, in other decisions the Court has held "that Congress does not have the power to repudiate its own debts, which constitute 'property' to the lender, simply in order to save money." *Id.* Cited in support of this proposition are the decisions in *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935) and *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934).

There are, then, recognized limits upon Congress' power to enact legislation that impairs rights created under contracts with the Government. The question is whether those limits have been exceeded here. Is this a case in which the Government's actions amount to a deprivation of property "already acquired"? The answer is yes.

The several contracts between plaintiff and the United States were essentially requirements-type contracts under the terms of which plaintiff had the right to order uranium enrichment services from the Government at published market prices that were not to exceed a stated per-unit amount. Significantly, those contracts contained no provision permitting the Government to reprice its services if, upon a post-performance evaluation, the prices charged were found to have been too low. Nor would such a provision have been called for. It was the AEC's mandate from the start to price its services so as to assure "reasonable compensation to the Government." Act of August 26, 1964, Pub.L. No. 88-489, 78 Stat. 602, 606 (1964) (formerly codified at 42 U.S.C. § 2201(v)(B) (1964); current version at 42 U.S.C. § 2201(v) (1988 & Supp. IV 1992)). Subsequent legislation made clear that this pricing standard was intended to accomplish a "recovery of the Government's costs over a reasonable period of time." Act of December 14, 1970, Pub.L. No. 91-560,

84 Stat. 1472, 1474 (1970) (formerly codified at 42 U.S.C. § 2201(v)(B) (1970); current version at 42 U.S.C. § 2201(v) (1988 & Supp. IV 1992)). In short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services.

Given this statutory background and the fixed-price character of the Government's undertaking, plaintiff was justified in concluding that, upon payment to the Government for services ordered, the transactions involved would become final. That conclusion is founded on the principle that one who undertakes to perform at a fixed price thereby assumes the burden of all unanticipated costs. *United States v. Spearin*, 248 U.S. 132, 135-36, 39 S.Ct. 59, 60-61, 63 L.Ed. 166 (1918). Simply put, the Government bargained away the right to demand additional compensation from plaintiff (for the same services) to meet risks not foreseen at the time the contracts were made. Correspondingly, the economic benefit which plaintiff gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away. *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843-844 ("Rights against the United States arising out of a contract with it are protected by the Fifth Amendment.")

The Government endeavors to avoid this result by claiming that the special assessment represents an exercise of the sovereign's taxing power and, as such, cannot be abridged in favor of private contract rights. We do not accept this contention. The argument would have some force if we were dealing with a general tax that fell on all utilities alike. That, however, is not our case. Rather, this special assessment reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services, and it taxes them according to the number of separative work units purchased. Clearly, then, the assessment is

an add-on to the price previously paid to the Government. Thus, by imposing the assessment in the manner here described, the Government dishonors the very promise it had earlier made: that the price to be charged for its services would not exceed the contract-stated maximum. Legislation so plainly directed at undoing a contract liability previously assumed by the Government is an impermissible exercise of sovereign power. "The doctrine of 'public and general' 'sovereign acts', laid down in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925), does not relieve the Government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused." *Freedman v. United States*, 162 Ct.Cl. 390, 402, 320 F.2d 359, 366 (1963).

Indeed, the Government's actions are tantamount to an abrogation of contract rights akin to that declared unlawful in *Perry* and *Lynch*. In *Perry* the Court struck down, as beyond congressional power, a joint resolution of the Congress that included language repealing the Government's obligation to repay its bondholders in gold coin. And in *Lynch*, the Court found a similar want of authority in Congress' attempted repeal of the Government's obligation to pay in accordance with the terms of a war-risk insurance policy. Though, in each case, the action taken by the Government was prompted by concerns for the Nation's economy and the need to save money, this reason was held insufficient to sanction the extinguishment of vested contract rights. The reasoning went as follows:

> No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations

> of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen." *Sinking-Fund Cases*, 99 U.S. 700, 719.

Lynch v. United States, 292 U.S. at 580, 54 S.Ct. at 844.

During the oral argument of the case, counsel for the Government sought to distinguish *Perry* and *Lynch* on the ground that there the content of the promises undertaken by the Government was spelled out in statute [3] whereas here the substance of the commitment was determined by an Executive agency. In counsel's view, only the former can give rise to a vested right; the latter, it is argued, remains subject to the risk of impairment by subsequent legislation unless secured against that possibility by specific protective language.

We do not accept this distinction. A contract with the United States is not of lesser dignity because its terms originate in Executive judgment rather than legislative prescription. Commitments made by the Executive, when authorized by statute, are no less sovereign in character than commitments made by the Legislature itself. It is not the source of the Government's promise that determines the existence of a vested right, but the extent to which the bargain between the parties has been carried out. A contract that has been performed to the extent of giving

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[3] The statutory authorizations underlying the obligations addressed in *Perry* and *Lynch* are, respectively, Act of September 24, 1917, ch. 56, 40 Stat. 288 (authorizing issuance of war bonds) and Act of October 6, 1917, ch. 105, 40 Stat. 398 (establishing Bureau of War Risk Insurance).

the Government all that it bargained for creates a vested right in the other party to the return performance promised by the Government. *Texas Pacific Coal & Oil Co. v. Honolulu Oil Corp.*, 241 F.2d 920, 922 (5th Cir.1957).

Similarly, when a contract between citizen and Government is fully performed on each side, the resulting exchange of values amounts in substance to an exchange of property interests. The interests acquired become vested interests—the "fruits actually reduced to possession of contracts lawfully made," *Sinking-Fund Cases*, 99 U.S. at 720, that are entitled to protection under the Takings Clause of the Fifth Amendment. *Lynch v. United States*, 292 U.S. at 579, 54 S.Ct. at 843-844.

CONCLUSION

For the reasons stated, the court concludes that, as applied to plaintiff, the special assessment amounts, in part, to an unlawful exaction because it violates the Government's earlier commitments to supply enriched uranium at contract prices not to exceed a stated amount and thus improperly diminishes the value of the property (the economic advantage) that plaintiff acquired pursuant to those commitments. Plaintiff is entitled to the benefit of its bargain; hence, those portions of the annual assessments that relate to plaintiff's 1963, 1969, and 1971 contract purchases of enriched uranium from the Government must be refunded together with interest. The amount of the judgment to be entered shall be based on a stipulation to be filed by the parties within 30 days from the date of this opinion.[4]

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[4] In view of the conclusion reached, we deem it unnecessary to address plaintiff's separate contention that the special assessment was intended only to apply to operating utilities.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

96-5021, -5025

YANKEE ATOMIC ELECTRIC COMPANY,
Plaintiff/Cross-Appellant,

v.

THE UNITED STATES,
Defendant-Appellant.

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the CROSS-APPELLANT, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDER TION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 22, 1997.

Circuit Judge NEWMAN would rehear the appeal in banc.

Five Briefs were filed by Amici Curiae.

FOR THE COURT,

JAN HORBALY
Clerk

Dated: August 15, 1997

By /s/ Alex Van Veen
ALEX VAN VEEN
Staff Law Clerk

APPENDIX D

STATUTORY PROVISIONS

1. Section 2297g of Title 42, U.S.C., provides in relevant part:

§ 2297g. Uranium Enrichment Decontamination and Decommissioning Fund

(a) Establishment

There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this subchapter as the "Fund"). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this subchapter.

2. Section 2297g-1 of Title 42, U.S.C., provides:

§ 2297g-1. Deposits

(a) Amount

The Fund shall consist of deposits in the amount of $480,000,000 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

(b) Source

Deposits described in subsection (a) of this section shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

(c) Special assessment

The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before October 24, 1992. For purposes of this subsection—

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

(d) Authorization of appropriations

There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

(e) Termination of assessments

The collection of amounts under subsection (c) of this section shall cease after the earlier of—

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

(f) Continuation of deposits

Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

(g) Treatment of assessment

Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

3. Section 2297a of Title 42, U.S.C., provides in relevant part:

§ 2297a. Purposes

The Corporation is created for the following purposes:

(1) To operate as a business enterprise on a profitable and efficient basis.

(2) To maximize the long-term value of the Corporation to the Treasury of the United States.

* * * *

(7) To conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or sources of Federal financing other than those provided in this division.